IN THE

Supreme Court of the United States

OCTOBER TERM, 1942. No. 969

AMERICAN GAS AND ELECTRIC COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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APRIL 28, 1943.

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CITATIONS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The undersigned, on behalf of the above named Petitioner, pray that a Writ of Certiorari issue to review a final Decree of the United States Court of Appeals for the District Court of Columbia rendered on February 1, 1943, in the case between the above named parties docketed therein as No. 7948.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals was handed down on February 1, 1943, and is not yet reported (R. 518). The Securities and Exchange Commission issued an Opinion dated May 12, 1941, which will be reported in 9 S. E. C. 247 (R. 13).

JURISDICTION.

The Decree of the Court of Appeals was entered on February 1, 1943 (R. 518). This Petition is filed before May 1, 1943.

The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935 (hereinafter called the "Act," 49 Stat. 803; 15 U. S. C. A. Sec. 79) and under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347).

MATTERS INVOLVED.

The basic matter involved is whether American Gas and Electric Company (herein sometimes called "American Gas") is or is not a subsidiary of Electric Bond and Share Company (herein called "Bond and Share") within the meaning of the Act. Both companies are public utility holding companies registered as such. Bond and Share owns 17.51% of the outstanding voting securities of American Gas and has two representatives on its Board of fifteen directors and one on its Executive Committee of five members.

The proceeding in the Court of Appeals was upon a Petition filed by American Gas, Petitioner herein, under Section 24(a) of the Act for review of an Order of the Securities and Exchange Commission (herein called the "Commission") which denied Petitioner's Application for an Order by the Commission declaring that Petitioner (American Gas) is not a subsidiary of Bond and Share.

Section 11(b) of the Act makes it the duty of the Commission "to require * * * that each registered holding company, *and each subsidiary company thereof,** shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which

* Emphasis supplied.

such company is a part to a single integrated public utility system," with provisions permitting the retention of one or more additional integrated systems under specified conditions not here involved.

Section 2(a) (29) (A) of the Act defines an "Integrated public-utility system" as follows:

> "(29) 'Integrated public-utility system' means—
>
> (A) As applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation;"

Section 2(a) (9) defines a holding company system as follows:

> "(9) 'Holding-company system' means any holding company, together with *all* its subsidiary companies, * * *." (Emphasis supplied.)

If American Gas is *not* a subsidiary of Bond and Share, the provisions of Section 11 of the Act requiring the integration of holding company systems will apply separately to its own system, namely, itself and its own subsidiaries, which, with unimportant exceptions, consist of eleven electric utility companies (all but two of which are presently interconnected) supplying approximately 830,000 customers in nine contiguous states, viz., New Jersey, Pennsylvania, Ohio, Indiana, Michigan, Virginia, West Virginia,

Kentucky and Tennessee, and the determination of the single integrated system which it will be allowed to retain (and also of such additional systems as it may be allowed to retain) will be determined without reference to and unaffected by the problems involved in the application of Section 11 to Bond and Share. Bond and Share has three acknowledged subsidiary holding companies each with numerous subsidiary operating utility companies operating in twenty-seven states and the problem of its "integration" is correspondingly large and complicated. And, if American Gas *is* a subsidiary of Bond and Share, then the provisions of Section 11 will apply to all of the companies in these combined systems which would be treated as a single holding company system of Bond and Share and the fate of Petitioner's system would be subject to such action as the Commission might deem necessary to limit the operations of the Bond and Share holding company system to a single integrated public utility system and such additional systems as the Commission might permit to be retained if it found that the strict requirements of the Act with reference to the retention of additional systems are met.

Thus the status of American Gas as being or not being a subsidiary of Bond and Share is a matter of great importance to American Gas and to the thousands of independent holders of its securities.

Section 2(a)(8) of the Act, the pertinent portions of which are printed as an Appendix at the end of the brief in support of this Petition, prescribes a formula and procedure for determining whether one company is a subsidiary of another company. Briefly, it is there provided that any company (in this case American Gas), ten per centum or more of whose outstanding voting securities are held by a specified holding company (in this case Bond and Share) is a subsidiary of the latter unless the Commission, upon application, finds that (i) it is not

controlled by the latter; (ii) that it is not an intermediary through which the latter controls some other company; and that

> "(iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies."

If the Commission does so find, the section provides that it "shall by order declare that a company is not a subsidiary company of a specified holding company."

Petitioner's Application to the Commission was made under that provision. The Commission, in denying the Application, based its action solely on clause (iii), the "controlling influence" clause, and adopted the construction applied to that clause by the United States Circuit Court of Appeals for the Sixth Circuit in *Detroit Edison Company* v. *Securities and Exchange Commission*, 119 Fed. (2d) 730 (May 12, 1941). This construction is, in substance, that "controlling influence" includes a "latent power to assume such control" and that the phrase "does not necessarily mean that those exercising controlling influence must be able to carry their point." The Commission's ultimate inferential finding of fact, advanced in support of its ultimate conclusion that "controlling influence," as so defined, existed in the present case, was the finding of "past relationships between applicant [American Gas] and Bond and Share which clearly 'have resulted in a personnel and tradition' which make applicant responsive to Bond and Share's desires." The Court of Appeals, in denying applicant's Petition for

Review, adopted the construction of the "controlling influence" clause which the Commission had used and also held:

> "Giving due weight to the past relationships of petitioner and Bond and Share and the other evidences of Bond and Share's present position of authority and influence in petitioner's management and stock ownership, we cannot say that the inferences drawn therefrom by the Commission to find 'a personnel and tradition' which make petitioner responsive to Bond and Share's desires are unreasonable."

Associate Justice Stephens filed a dissenting opinion (R. 531 to 547) in which he expressed himself as unable to agree with the Court's construction of "controlling influence" and in which he expressed the view that the basic facts relied on by the Commission do not give coherent or rational support to the Commission's inferential finding; that they in fact support a contrary influence, and that other facts of record are wholly inconsistent with the Commission's conclusion.

The matters involved thus include the proper construction of Section 2(a)(8) of the Act, which has never been construed by this Court, and the question of whether the Commission's ultimate finding of fact was supported by substantial evidence as required by Section 24(a) of the Act. On both of these points, the dissenting Associate Justice has expressed himself as in strong disagreement with the majority of the Court.

SPECIFICATIONS OF ERROR.

The Court of Appeals erred:

1. In its construction of the term "controlling influence" as used in the Act.

2. In holding that the Commission's inferential finding that the basic facts "show past relationships be-

tween applicant [American Gas] and Bond and Share which clearly 'have resulted in a personnel and tradition' which make applicant responsive to Bond and Share's desires" is supported by substantial evidence and is not unreasonable.

3. In denying the Petition to set aside the Commission's Order and in affirming the Order of the Commission.

QUESTIONS PRESENTED.

1. What is the meaning of the term "controlling influence" as used in the Act?

Is it some latent ability to bring into effect at some future time *some* influence but one which is impotent to control management or policies? Or is it a presently existing control by *influence* as distinguished, for example, from control by majority stock ownership or majority representation on the Board of Directors?

2. Is the Commission's inferential finding of "past relationships between applicant and Bond and Share which clearly 'have resulted in a personnel and tradition' which make applicant responsive to Bond and Share's desires" "supported by substantial evidence?"

Or is it an unwarranted inference erected upon but part of the evidence, *i. e.*, "past facts" which even considered alone give it no rational support; and an inference which is directly negatived by present facts established by competent, adequate, direct and uncontradicted evidence?

REASONS FOR GRANTING THE WRIT.

1. The interpretation of the phrase "controlling influence" in the Act must necessarily have an important effect upon the administration of the Act and upon public utility holding companies, public utility operating

companies, the investors in their securities and the consumers they serve. The Act was passed in 1935 and arguments and uncertainties about the meaning of this phrase have continued ever since. This question is one of substance and of general importance relating to the construction of a statute of the United States which has not been but which, it is respectfully submitted, should be settled by this Court.

2. The "substantial evidence" rule which is involved in judicial review of findings of administrative commissions under organic statutes which, like the Act here involved, provide that such commission's "findings * * * as to the facts, if supported by substantial evidence, shall be conclusive" warrants review by this Court in a case where, upon examination, it may appear that the Commission's ultimate and determinative finding is a pure inference erected on certain basic facts which give such inference no rational support and which *inference* is completely refuted by direct, competent and adequate proof of the contemporaneous and present ultimate fact. The dissenting Associate Justice was of opinion that the present case is such a case. If he be right, then, if further review is denied, Petitioner will have been subjected to an arbitrary ruling and action by the Commission which all would agree to be contrary to the system of law guaranteed by our Constitution and violative of Petitioner's rights thereunder.

Wherefore, it is respectfully submitted that the Petition should be granted.

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APRIL 28, 1943.